In the Supreme Court of the United States

October Term, 1944.

No.....

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW.

An opinion by the District Court, written by District Judge James H. Baldwin (since deceased) was filed December 31, 1943. It appears at pages 14 to 42 of the Record, and has not been officially reported. An opinion by the Circuit Court of Appeals was filed October 18, 1944, and appears at pages 59 to 70 of the Record. It is reported in 145 Fed. (24) 255 (Adv. Op.)

II.

JURISDICTION.

Petitioner adopts the jurisdictional statement and petition in the Petition for Writ of Certiorari (p. 6 hereof) as supporting the jurisdiction of this Court.

III.
STATEMENT OF THE CASE.

Petitioner adopts the "SUMMARY STATEMENT OF THE MATTER INVOLVED", appearing in the Petition for Writ of Certiorari (pp. 1-5 hereof), as a statement of the case for the purpose of this brief.

IV.
SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

1. In deciding that the will gives all of the property to Respondent Blacker and reversing the decision of the District Court, the Court failed to follow the law of Montana as declared by Section 7021 of the Revised Codes of Montana of 1935 and announced by the Supreme Court of that State.

2. In treating the matters affirmatively alleged in the answer as material and failing to remand the case to the District Court for trial of the issues presented by those allegations.

SUMMARY OF THE ARGUMENT

Argument herein follows in sequence the "SPECIFICATIONS OF ERROR", set forth above, and the "QUESTIONS PRESENTED" (pp. 5-6 hereof).

Part I is devoted, first, to the conflict between the decision of the Circuit Court of Appeals and Section 7021 R. C. M. 1935, and, second, to the conflict between the decision of the Circuit Court of Appeals and the decision of the Supreme Court of Montana

in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902.

Part II is devoted to the question as to whether the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, and the question as to whether petitioner has been denied the right to trial as guaranteed by the Fifth Amendment to the Constitution of the United States.

ARGUMENT

I.

THE CONFLICT WITH THE LAW OF MONTANA. (Question I and Spec. of Err. 1.)

A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH SECTION 7021 MONTANA REVISED CODES, 1935.

The construction of the will in this case involves the single question as to what, if any, property is left undisposed of by the will. The only language in the will which relates to the disposition of any property is contained in the paragraph entitled "Second", of the will, which reads as follows:

> "Second. I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery. All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated." (R. 7)

The first sentence is a "clear and distinct bequest." That paragraph must be construed "in strict con-

formity with the pertinent sections of our statutes". In re Yergy's Estate, 106 Mont. 505, 511, 79 Pac. (2d) 555, 558. Section 7021 R. C. M. 1935 which is the only Montana statute dealing specifically with a "clear and distinct bequest" reads as follows:

> *"A clear and distinct devise or bequest cannot be affected* by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." (Italics ours).

Although cited and relied upon by petitioner (R. 72), it is not referred to in the opinion of the Circuit Court of Appeals and the Court failed to apply it in construing the will.

Section 7021 has never been construed or applied by the Supreme Court of Montana, but that fact did not relieve the Circuit Court of Appeals from applying it in this case. Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op., p. 6). However, there is no need for construction of that statute for, as said in State v. State Highway Commission, 82 Mont. 63, 71, 265 Pac. 1, 4,:

> "'whenever the language of a statute is plain, simple, direct and unambiguous, it does not require construction, but it construes itself.' * * * 'It is not allowable to interpret what has no need of interpretation, or, when the words have a definite and precise meaning to go elsewhere in search of conjecture in order to restrict or extend their meaning'."

The import of Section 7021 is contained in the words "cannot be affected". "Affected" is defined

by Webster to mean "influenced", and by the courts as follows:

In Richardson v. Woodward, (C. C. A. 4), 104 Fed. 873, 874, the court said:

> "'shall not affect' means shall not *enlarge* or *diminish*." (Italics ours).

In Holland v. Dickerson, 41 Iowa 367, 373, the court said:

> "To affect does not mean to impair, but to work a change upon. A right is affected, if it is either *enlarged* or *abridged*." (Italics ours). (Quoted and adopted in Harris v. Friend, 24 N. M. 627, 175 Pac. 722, 725).

The bequest,

> "I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery."

is clear and distinct within the meaning of Section 7021 and, by enlarging that bequest to include all of the testator's property, the Court has done just what Section 7021 forbids, to-wit:

1. It has allowed the phrase,

> "All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated.",

which contains no verb or operative word to "affect" the "clear and distinct bequest" contained in the preceding sentence. In using that phrase and in setting it off by itself, beginning with a capital letter and ending with a period, it is clear that the testator recognized that the bequest to Miss Blacker was limited to the property described in the preced-

ing sentence and that a "residue" remained, which he intended to, but did not, dispose of.

Referring to a situation similar to the one under consideration, the Supreme Court of California in In re Upham's Estate, 127 Cal. 90, 97, 59 Pac. 315, 318, said:

> "* * * how can a subsequent clause, which expressly refers to and *recognizes* as existing a previous clause, be held to revoke or destroy the latter, *where there are no operative words to that effect,* or which express any such intent? Moreover, it is a rule of construction of wills —declared by our Code (section 1322, Civ. Code)—that 'a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will';" (Italics ours). See note below.

2. The Court has also allowed "argument from other parts of the will" to "affect" the "clear and distinct bequest." In its opinion it says that, because Respondent Blacker is the only person named in the will, it seems "reasonably certain" that testator intended that she should take all of his property. (R. 69).

Section 7021 R. C. M. 1935 is identical with Section 1322 of the California Civil Code, and both were taken from Section 584 of Field's Civil Code. That Code was never adopted in New York but has, with minor changes, been adopted in five western states, including Montana and California. California Law Review, Vol. 10, p. 187.

If the testator had intended that Respondent Blacker should have all of his property, he could and undoubtedly would have expressed that intention by the three words "all my property".

3. The Court has also resorted to "inference". It infers that the testator specifically enumerated the household and personal effects because he may have thought that those items would be "claimable as, of course, by immediate relatives". (R. 70).

4. The Court has also allowed "other reasons" to "affect" the bequest to Respondent Blacker, to-wit: The matters affirmatively alleged in the answer (R. 9-12). In its opinion it says: "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction." (R. 70).

Resort to such extrinsic matters is within the express prohibition of Section 7021, that a "clear and distinct devise or bequest cannot be affected by any reasons assigned therefor.".

From the opinion it appears that the Court's error in this respect was due to the fact that it based its decision upon an intention which it thought existed in the mind of the testator at the time he made his will, rather than upon the intention of the testator as expressed by the language used in the will. In its opinion it says:

> "While fixed rules for the interpretation of writings afford helpful guides, they yield in cases of the construction of wills to the basic principle that the thing to be sought for and

> found, if possible, is the intention of the testator." (R. 69),

and cites Colton v. Colton, 127 U. S. 300, 310, wherein this Court stated the correct rule as follows:

> "The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning *of the words he has used.*" (Italics ours).

As said by this Court in Barber v. Pittsburg Ft. W. & C. R. Co., 166 U. S. 83, 109,:

> "'A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, *but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.*' King v. Ackerman, 67 U. S. 2 Black, 408, 418." (Italics ours).

Section 7021 is a statutory declaration of the intention of a testator where the will contains a "clear and distinct bequest" and must be given effect regardless of the rule against intestacy referred to by the Circuit Court of Appeals (R. 68). This rule is stated in In re Murphy's Estate, 157 Cal. 63, 106 Pac. 230, 234, as follows:

> "* * * a canon of interpretation applicable to prevent intestacy cannot be invoked to set aside plain rules of law declaring the legal meaning and effect to be given to language used in such a devise as is here under consideration."

B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF MONTANA IN IN RE McLURE'S ESTATE, 63 MONT. 536, 541, WHICH IS TO THE EFFECT THAT HEIRS AT LAW MAY NOT BE DISINHERITED EXCEPT WHERE SUCH INTENT IS EXPRESSED IN LANGUAGE WHICH IS CLEAR AND UNEQUIVOCAL.

In In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, the Supreme Court of Montana said:

> "Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law would have given to her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language."

The rule of interpretation referred to is particularly well stated in Wilkins v. Allen, 18 How. 385, 15 L. Ed. 396, 398, as follows:

> "In speaking of expressions in a will necessary to disinherit the heir, Chief Justice Gibson, in delivering the opinion of the court in the case of Bradford v. Bradford, 6 Whart., 244 says: 'The intention must be manifest, and rest on something more certain than conjecture. The court must proceed on known principles, and established rules, not on loose conjectural interpretations, nor considering what a man may be imagined to do in the testator's circumstances. The principle is applicable in all its force in a case like the present, in which the question goes to the birthright of those who,

> standing in place of the common law heir, are not to be disinherited except by express devise, or as is said in 1 Powell on Devises, 199, by implication so inevitable that an intention to the contrary cannot be supposed.' "

This rule was a part of the common law, Kellett v. Kellett, 3 Dow. App. Cas., 248, and, although not embraced in the Montana Code, it is the law of Montana. In speaking of a rule which is not embraced within the Montana Code, the Supreme Court of Montana, in Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 382, 170 Pac. 760, said: "the question is one to be resolved according to the common law" and, in State ex rel LaPoint v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89: "Our Code further recognizes the continuance of the common law and that the codification does not embrace the whole body of the law". See also, Forrester v. B. & M. Min. Co., 21 Mont. 544, 556, 55 Pac. 229, 234.

The fact that the Circuit Court of Appeals found it necessary to resort to inference, argument from other parts of the will, and the extrinsic circumstances alleged in the answer, to support its conclusion that the will gives all of Mr. Hauser's property to Respondent Blacker, is a recognition of the fact that the intention of the testator to disinherit his heirs is "not expressed in clear and unequivocal language".

Among the matters affirmatively alleged in the answer as one of the circumstances indicating that Mr. Hauser intended Respondent Blacker to have all of his property is that concerning the alleged

estranged relations between Mr. Hauser and his sister, your petitioner (R. 11). As petitioner is but one of seven heirs, Mr. Hauser's relations with her cannot shed any light upon the question as to whether he intended to disinherit all of his heirs. This indicates one of the reasons for the rule that heirs at law should not be disinherited except by language which is "clear and unequivocal".

II.

IS THE FAILURE OF THE CIRCUIT COURT OF APPEALS TO REMAND THE CASE TO THE DISTRICT COURT FOR TRIAL, AFTER IT HAS DECIDED THAT THE MATTERS AFFIRMATIVELY ALLEGED IN THE ANSWER ARE MATERIAL, A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IN CONFLICT WITH DECISIONS OF THIS COURT?

(Question II & Spec. of Err. 2).

As stated by the Circuit Court of Appeals in its opinion:

> "The answer contains affirmative matter bearing on the circumstances of the testator's life. It is alleged that at the time of the making of his will his wife was dead; that appellant Blacker had from childhood been a close companion and associate of Hauser and his wife; that she had been engaged to marry Hauser for some months prior to his decease; and that for many years Hauser had been estranged from the complainant, his sister." (R. 60)

Petitioner challenged the materiality of those allegations by motion for judgment on the pleadings, which is, in effect, a demurrer. Samuell v. Moore Merc. Co., et al., 62 Mont. 232, 237, 204 Pac. 376, 377; David v. Robert Dollar Co., (C. C. A. 9), 2 Fed. (2d) 803, 806.

The Circuit Court of Appeals decided that the matters affirmatively alleged are material and resorted to them in its construction of the will. In its opinion it said:

> "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction." (R. 70)

In doing this and reversing the judgment of the District Court, the Circuit Court of Appeals has created a situation which is the same as though the motion had been denied by the District Court and, by virtue of Federal Rules of Civil Procedure 7(a) and 8(d), the affirmative allegations of the answer stand denied. Therefore, the petitioner is entitled to a trial of the issues of fact raised by those allegations. Hammond v. Schappi Bus Line, 275 U. S. 164, 172; Wyman v. Wyman, (C. C. A. 9) 109 Fed. (2d) 473, 474.

The decree of the Circuit Court of Appeals, reversing the judgment of the District Court with directions "to make findings and to enter judgment in harmony with the opinion of this court" (R. 71), makes the opinion (R. 59-70) a part of the mandate, and the District Court cannot do otherwise than

enter judgment giving all of the property to Respondent Blacker. Gulf Refining Co. v. United States, 269 U. S. 125, 135.

The result of the decision of the Circuit Court of Appeals is to deprive petitioner of the right to trial of the issues raised by the answer, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. In this respect, the decision is in conflict with the decisions of this Court in Saunders v. Shaw, 244 U. S. 317, 319 and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171.

As we have pointed out, petitioner contended in the courts below and here contends that the circumstances affirmatively alleged in the answer are immaterial. However, if, as decided by the Circuit Court of Appeals, they are material, petitioner is entitled to her "day in court" and the opportunity to introduce evidence in denial and rebuttal of those allegations.

Petitioner believes that she will be able to show that she was not estranged from her brother, the testator, at the time of his death, that the testator was not engaged to Respondent Blacker, and other circumstances wholly inconsistent with any intention to disinherit either your petitioner or his other heirs. The Court may not assume that such a showing cannot be made. Saunders v. Shaw, 244 U. S. 317, 319.

CONCLUSION.

The decision of the Circuit Court of Appeals is in conflict with Section 7021 Revised Codes of Mon-

tana of 1935, the decision in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, the due process clause of the Fifth Amendment to the Constitution of the United States, and the decisions of this Court in Saunders v. Shaw, 244 U. S. 317, 319, and Georgia R. & Elec. Co. v. Decatur, 296 U. S. 165, 171.

That these conflicts involve such important questions as are contemplated by Paragraph 5(b) of Rule 38 of this Court is clearly established by the fact that if the decision of the Circuit Court of Appeals is allowed to stand:

It will result in confusion and uncertainty as to the property rights of the heirs of a resident of Montana, for there will be one rule of property for citizens of Montana and a different rule for non-residents who may resort to the Federal Courts.

It will stand as an invitation to non-residents of Montana to resort to the Federal Courts in that state in the hope of enlarging or diminishing clear and distinct bequests and devises contained in the wills of deceased residents of Montana.

It will tend to increase the trial of cases upon allegations of fact when they should be decided and disposed of upon questions of law. A litigant will hesitate to submit a case upon a question of law by motion for judgment on the pleadings or to dismiss when, if the motion is denied, he will be deprived of the right to trial of allegations of fact which the Court has decided are material.

It will deprive petitioner of her right to a trial of the issues raised by the affirmative allegations of

the answer, in violation of the Fifth Amendment to the Constitution of the United States.

Furthermore, the mandate constitutes such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's supervision (Paragraph 5(b) of Rule 38 of this Court).

Respectfully submitted,

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